

Nos. 23-12408-E & 23-12411-J (consolidated)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

◆

BLAKE WARNER,
Plaintiff-Appellant,

v.

SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA,
Defendant-Appellee.

◆

On Appeal from the United States District Court
for the Middle District of Florida
(8:23-cv-00181-SDM-JSS & 8:23-cv-01029-SDM-SPF)

REPLY BRIEF OF APPELLANT

Jeffrey C. Mateer
Hiram S. Sasser, III
David J. Hacker
Justin E. Butterfield
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy., Suite 1600
Plano, Texas 75075
Tel: 972.941.4444
Fax: 972.941.4457
jmateer@firstliberty.org
hsasser@firstliberty.org
dhacker@firstliberty.org
jbutterfield@firstliberty.org

Aaron M. Streett
BAKER BOTTS LLP
910 Louisiana Street
Houston, Texas 77002-4995
Tel: 713.229.1234
Fax: 713.229.1522
aaron.streett@bakerbotts.com

Matthew P. Erickson
Matthew M. Hilderbrand
BAKER BOTTS LLP
401 South 1st Street, Suite 1300
Austin, Texas 78704-1296
Tel: 512.322.2500
Fax: 512.322.2501
matthew.erickson@bakerbotts.com
matthew.hilderbrand@bakerbotts.com

Attorneys for Appellant Blake Warner

Nos. 23-12408-E and 23-12411-J (consolidated)
Warner v. School Board of Hillsborough County, Florida

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 21.1-1, the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case:

1. **AKERMAN LLP** (Attorneys for Appellee)
2. **BAKER BOTTS, LLP** (Attorneys for Appellant)
3. **BUTTERFIELD, Justin** (Attorney for Appellant)
4. **ERICKSON, Matthew P.** (Attorney for Appellant)
5. **IORE, Kristen** (Attorney for Appellee)
6. **FIRST LIBERTY INSTITUTE** (Attorneys for Appellant)
7. **FLYNN, Hon. Sean P.** (U.S. Magistrate Judge, M.D. Fla.)
8. **HILDERBRAND, Matthew M.** (Attorney for Appellant)
9. **J.W.** (Minor child of Appellant)
10. **MARGOLIN, Jason L.** (Attorney for Appellee)
11. **MERRYDAY, Hon. Steven D.** (U.S. District Judge, M.D. Fla.)

12. **MORAN, Gregg** (Attorney for Appellee)
13. **ROBINSON, Benjamin** (Attorney for Appellee)
14. **SASSER, Hiram** (Attorney for Appellant)
15. **SCHOOL BOARD OF HILLSBOROUGH COUNTY, FL** (Appellee)
16. **SNEED, Hon. Julie S.** (U.S. Magistrate Judge, M.D. Fla.)
17. **STREETT, Aaron M.** (Attorney for Appellant)
18. **WARNER, Blake Andrew** (Appellant)

The undersigned also certifies that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

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STATUTES

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OTHER AUTHORITIES

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ARGUMENT

Appellee filed a one-and-a-half-page response brief stating generally that it believes the district court properly applied this Court's precedents, but taking "no position on Warner's assertion that the precedent is wrong." Appellee's Br. at 2.

Appellant wishes only to reiterate, as he explained in his opening brief, that the "precedents" in question are all unpublished—except for *Devine*. See Appellant's Br. at 9 (citing *Devine v. Indian River Cnty. Sch. Bd.*, 121 F.3d 576, 581-82 (11th Cir. 1997), *overruled in part by Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007)). Thus, they are not precedents. See 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."); Fed. R. App. P. 36, I.O.P. 7 ("The court generally does not cite to its 'unpublished' opinions because they are not binding precedent.").

As explained in the opening brief, *Devine* does not support the district court's judgment for three reasons. First, its holding was narrow, applying only to cases under the Individuals with Disabilities Education Act (IDEA),

20 U.S.C. § 1400 *et seq.* See *Devine*, 121 F.3d at 581-82. Second, that holding was expressly overruled by the Supreme Court in *Winkelman*, 550 U.S. at 535. Third, even if *Devine* were binding, it did not hold that dismissal of the child's claim was the proper remedy. Nevertheless, courts in this circuit have mistakenly treated *Devine* as requiring the counsel mandate. See Appellant's Br. at 30-31 n.7 (collecting cases).

Thus, the district court's *sua sponte* decision could not have "correctly applied this Court's precedent." Appellee's Br. at 2. To the best of Appellant's knowledge, there was no precedent to apply. This Court is free to reach the unresolved legal dispute on the merits.

CONCLUSION

This Court should reverse.

Dated: February 5, 2024

Respectfully submitted,

BAKER BOTTS, LLP

/s/ Matthew P. Erickson

Matthew P. Erickson

BAKER BOTTS LLP

401 South 1st Street, Suite 1300

Austin, Texas 78704-1296

Tel: 512.322.2500

Fax: 512.322.2501

matthew.erickson@bakerbotts.com

Aaron M. Streett

BAKER BOTTS LLP

910 Louisiana Street

Houston, Texas 77002-4995

Tel: 713.229.1234

Fax: 713.229.1522

aaron.streett@bakerbotts.com

Justin Butterfield

Hiram Sasser

FIRST LIBERTY INSTITUTE

2001 W. Plano Pkwy., Suite 1600

Plano, Texas 75075

Tel: 972.941.4444

Fax: 972.941.4457

jbutterfield@firstliberty.org

hsasser@firstliberty.org

Attorneys for Plaintiff-Appellant

Blake Warner

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the page and type-volume limitations of Fed. R. App. P. 32(a)(7), because it contains 297 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typespace using 14-point Palatino Linotype.

/s/ Matthew P. Erickson

Matthew P. Erickson

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2024, I electronically filed this brief and thereby served all counsel of record through the Court's CM/ECF system.

/s/ Matthew P. Erickson

Matthew P. Erickson